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No. 94-1311

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF CALIFORNIA, STATE OF NEVADA AND TAHOE REGIONAL PLANNING AGENCY,

Petitioners,

v.

TAHOE SIERRA PRESERVATION COUNCIL, ET AL.,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

A. Nature of the Case

This case is about 560 individual plaintiffs who many years ago purchased one or more vacant single-family lots located in established residential subdivisions on both the California and Nevada sides of the Lake Tahoe Basin, with the expectation of one day building their retirement, vacation, or permanent homes. Their dreams were later shattered when TRPA subsequently enacted a series of back-to-back moratoria and regulations, purportedly in the name of water clarity protection, that effectively prevented the plaintiffs from making any viable or reasonable use of their vacant homesites. In large measure, the 428 properties which remain at issue in this litigation are vacant lots, 1/4 to 1/3 acre in size, zoned only for single-family residences, are located in established residential neighborhoods in which a great many homes already have been built, and are served by paved roads, sewers, water service, and other necessary utilities.[1]

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[1] Several parcels are owned by more than one plaintiff, such as a husband and wife or a family owning a single parcel. The majority of the plaintiffs are senior citizens who had planned to build their retirement homes at Lake Tahoe. Since the action was first filed in 1984, approximately twenty of the original plaintiffs have died, and many others have chosen to dismiss their claims following the forced sale of their properties to one of the various public "buy-out" programs operating in the Tahoe Basin. In the California-side case, there remain 294 named-plaintiffs owning 258 properties on the California side of the Tahoe Basin; in the Nevada-side case, there remain 266 named-plaintiffs owning 170 properties on the Nevada side of the Tahoe Basin.

The twin Complaints in this matter were originally simultaneously filed in the Federal District Courts for Nevada and the Eastern District of California on June 25, 1984[2], more than ten years ago. This litigation has been pending since that time, but has not yet gone to trial. In their original Complaints, and in the subsequent First Amended Complaints filed after this matter was heard and remanded by the Ninth Circuit to the District Courts in 1991 as explained below, the plaintiffs alleged that all viable use of their properties was "taken" by the petitioner Tahoe Regional Planning Agency ("TRPA") by its enactment of a series of back-to-back ***interim*** and then ***permanent*** land-use moratoria and regulations during the 1980s which had the immediate effect of prohibiting any viable use of plaintiffs' properties. Plaintiffs now stand before the Court seeking Just Compensation under the Fifth and Fourteenth Amendments of the Constitution.

It is further alleged in their Complaints that the plaintiffs acquired their properties before TRPA suddenly decided in 1981, based on new-found environmental wisdom, to classify their properties as "environmentally sensitive" and to prohibit all reasonable use of those properties. Further it is alleged that at the time the plaintiffs acquired their properties (all were acquired before 1981), they had no

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[2] Article VI(j)(2)(A) of the TRPA Compact provides: "Venue lies . . . in the state or federal judicial district where the real property is situated." P.L. 96-551, 94 Stat. 3233 at Art.VI(j). Thus, two separate and nearly identical Complaints were originally filed in this case (and subsequently amended): one in the Nevada District Court applicable to the claims of those plaintiffs who own property located in the State of Nevada, and the other in the Eastern District of California applicable to the plaintiffs who own property located in the State of California.

knowledge that TRPA intended subsequently to preclude all reasonable use of their properties based on new environmental requirements. It is also alleged that the regulations at issue initially included an "interim moratorium" (TRPA's Ordinance 81-5) first adopted on June 25, 1981, which imposed the first ***temporary*** moratorium on the plaintiffs' use of their property while TRPA was purportedly adopting its required environmental thresholds and new regional plan mandated by the 1980 amendments to TRPA's Compact. Subsequently, that moratorium was extended by an additional eight-month ***temporary*** moratorium imposed by the TRPA Governing Board pursuant to its Resolution 83-21 adopted on August 26, 1983. Thereafter, in June, 1984 (34 months after the initial temporary moratorium was imposed), and over the vigorous protests of the plaintiffs, the TRPA finally adopted its ***permanent*** 1984 Regional Plan, by which it then made permanent the previous ***temporary*** prohibitions on use that had been adopted pursuant to Ordinance 81-5 and Resolution 83-21.

Within 60 days of the adoption of that 1984 Regional Plan which, to use the words of the Ninth Circuit in ***TSPC I*** (*see infra*, p.5), "made permanent" the predecessor temporary prohibitions on the use of the plaintiffs' properties, the plaintiffs filed their twin Complaints. Since that time, TRPA and the Attorneys General of the States of California and Nevada have vigorously defended against those lawsuits, seeking to justify TRPA's total prohibitions on the use of plaintiffs' properties, and arguing that TRPA was not required to pay Just Compensation to the plaintiffs.

At the same time these lawsuits were originally filed, TRPA was also sued in a separate action by others including the California Attorney General who contended that TRPA's 1984 Regional Plan did not go far enough in restricting

development on other properties in the Tahoe Basin. As a result of that separate lawsuit and in response to a TRO and Preliminary Injunction issued in that lawsuit, TRPA finally agreed to rewrite its 1984 Regional Plan. On June 25, 1987, in the midst of the first appeals to the Ninth Circuit in the instant lawsuits, TRPA adopted still another replacement Regional Plan (its 1987 Plan), which plaintiffs contend continued in full force and effect the very same prohibitions on the use of their properties at issue in the 1984 Plan, thus further extending the period of the takings triggered by the 1984 Plan and the predecessor interim regulations.

In brief, plaintiffs alleged with specificity in their detailed Complaints, and are prepared to prove at trial if finally given the opportunity, that by virtue of the back-to-back regulatory measures imposed by TRPA throughout the 1980s, they were denied all economically viable use of their single-family homesites continuously from June 25, 1981 up to and including the present, or, in the case of a few specified plaintiffs, until their properties were specifically reclassified by TRPA in 1989-90 as "buildable". The plaintiffs further alleged that they have not been offered nor received Just Compensation from TRPA for the taking of their properties, and that TRPA has denied their repeated requests for such Just Compensation.

B. Proceedings Below

For over ten years, plaintiffs have struggled for nothing more nor less than the right to have their day in court, and to have their cases resolved on their merits. They have been locked in a massive litigation battle with TRPA -- and its two partner states -- which have vigorously defended TRPA's right to impose the regulatory prohibitions at issue without compensating the plaintiffs, and have to date

prevented the plaintiffs from having their cases tried and resolved on the merits. Twice at the request of TRPA and its partner states the two district courts dismissed the respective cases on various ripeness, mootness, and related procedural grounds, and twice plaintiffs appealed to the Ninth Circuit. Twice the Ninth Circuit saw fit to reinstate substantial portions of the plaintiffs' claims and remanded the cases to the district courts so that the plaintiffs could finally have their cases heard on their merits. See ***Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency***, 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) [***"TSPC I"*** -- the Nevada-side case]; and ***Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency***, 938 F.2d 153 (9th Cir. 1991) [***"TSPC II"*** -- the California-side case].[3]

Following the remand to the two district courts from the Ninth Circuit in ***TSPC I*** and ***TSPC II***, the cases were then consolidated for further hearing and proceedings in the Nevada District Court.[4] Thereafter, with the permission of

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[3] The factual and procedural background of these cases is further summarized in ***TSPC I***, 911 F.2d 1331, 1333-4, and ***TSPC II***, 938 F.2d 153, 154, n.1, and at length in the separate First Amended Complaints filed by the Nevada-side plaintiffs on October 28, 1991 (C.R. 117) and the California-side plaintiffs on March 27, 1992 (C.R. 135a). Each Complaint also had appended separate detailed Appendices setting forth the specific factual allegations applicable to each named-plaintiff and their property at issue. Also see the Petition for Writ of Certiorari and Response thereto previously filed with this Court (No. 90-1212), and denied at 499 U.S. 943 (1991).

[4] Upon remand from the Ninth Circuit following its rulings in ***TSPC I*** and ***TSPC II***, the parties agreed that it was desirable and proper to consolidate the two cases for all further proceedings

the respective district courts, the plaintiffs duly amended their Complaints to conform to the Ninth Circuit's holdings and to update their allegations in light of subsequent events.[5] Subsequently, their First Amended Complaints were again met with motions to dismiss by the petitioners TRPA and its two partner states, this time primarily based on newly-asserted statute of limitations defenses.

On December 9, 1992, the Nevada District Court issued its twin Orders (808 F.Supp. 1474 reproduced in the Append. to Pet., pp. 9a-29a; and 808 F.Supp. 1484 at Append. to Pet., pp. 30a-48a) dismissing all claims of plaintiffs. It did so after considering only the briefs of the parties, and without affording the plaintiffs an opportunity for oral argument. In doing so, the District Court decided

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before a single district court. The cases were thereafter so consolidated before the District Court for Nevada in Reno by its Order entered on February 21, 1992, after both district judges determined that Senior District Judge Edward C. Reed should most appropriately be the judge to handle these consolidated cases. (C.R. 132.)

[5] Each Amended Complaint, after updating the pertinent factual allegations and adding allegations regarding the *effects* of the 1987 Plan in extending the period of the takings, set forth three separate Claims for Relief: a First Claim seeking Just Compensation under the Fifth and Fourteenth Amendments for those plaintiffs owning properties designated by TRPA as "stream environment zone" properties; a Second Claim seeking Just Compensation under the Fifth And Fourteenth Amendments for those plaintiffs owning so-called "Class 1, 2, and 3" environmentally-sensitive lots; and a Third Claim on behalf of all plaintiffs seeking Just Compensation and other related damages pursuant to 42 U.S.C. §§ 1983 and 1985 of the Federal Civil Rights Act.

to break the continuum of TRPA's regulatory actions into four distinct, bite-size pieces, and chose to separately analyze and address each piece as follows:

> (1) As to the impact of the initial Interim Ordinance 81-5, which the district court found was in effect from June 25, 1981 to August 28, 1983, the district judge concluded any claims arising from that "interim measure" were time-barred based on the 60-day statute of limitations imposed by Art. VI(j)(4) of the TRPA Compact, and that the plaintiffs should not have waited until that interim measure became "final" in 1984 before initiating its lawsuit.
>
> (2) As to the impact of TRPA's temporary Resolution 83-21, which imposed an additional 8-month interim moratorium immediately following Ordinance 81-5, the district court also found any claims arising therefrom were time-barred based on the same 60-day statute of limitations set forth in TRPA's Compact.
>
> (3) As to claims arising from TRPA's adoption of its 1984 Plan, the district judge in three short sentences, without further analysis, and without addressing the legal authorities or analysis offered by the plaintiffs in their brief, found that the plaintiffs' claims arising from the 1984 Plan "failed for lack of causation" based on the separate federal court injunction that in part prevented TRPA from fully implementing its 1984 Plan as to other properties (not plaintiffs' properties) in the Tahoe Basin, and were therefore dismissed.

(4) As to plaintiffs' allegations in their First Amended Complaints that TRPA's 1987 Plan (adopted in the midst of this litigation and while the matter was pending on appeal before the Ninth Circuit) on its face continued in full force and effect the same prohibitions set forth in TRPA's 1984 Plan precluding any reasonable use of plaintiff's property, the district court found the plaintiffs were precluded from amending their Complaints on remand to address the ***effect*** of the 1987 Plan on their original takings claims. It further found that the plaintiffs' failure to file new Complaints challenging that 1987 Plan in the midst of this litigation within the 60-day statute of limitations now barred them from asserting claims addressing the ***effect*** of that 1987 Plan on their pending claims.

In brief, after a decade of litigation, rather than affording the plaintiffs the opportunity to have their cases heard on the merits -- as so clearly they are entitled to do pursuant to ***TSPC I, TSPC II, First English Evangelical Lutheran Church v. County of Los Angeles***, 482 U.S. 804 (1987), and ***Lucas v. So. Carolina Coastal Commission***, ____ U.S. ____, 112 S.Ct. 2886 (1992) -- the district court summarily shut and locked the courthouse door, again compelling the plaintiffs to seek relief from the Ninth Circuit.

Thereafter, the matter was fully briefed and argued to the Ninth Circuit, which filed its Opinion on August 10, 1994 [***TSPC III***] (34 F.3d 753 (9th Cir. 1994)), reproduced in the Append. to Pet., 1a-6a.). Again, the Ninth Circuit reversed the district court in significant part, finding that plaintiffs' "takings claims" predicated upon 42 U.S.C. § 1983 were ***not*** time barred, nor were its claims against the

1984 Regional Plan properly dismissed based on the alleged lack of causation.

As to the argument raised before the Ninth Circuit primarily by the State of California that the TRPA Compact's 60-day statute of limitations served as a time bar to the plaintiffs' claims pursued under 42 U.S.C. § 1983, the Ninth Circuit quickly cut to the chase and found that TRPA's 60-day statute of limitations was "obviously" not the requisite statute of limitations applicable to plaintiffs' § 1983 claims under this Court's decision in ***Wilson v. Garcia***, 471 U.S. 261 (1985). Because the petitioners (TRPA and the two states) had not pled nor argued any other statute of limitations except TRPA's 60-day statute of limitations, and because the Ninth Circuit had found that the Compact's 60-day statute of limitations was inapplicable to bar plaintiffs' claims brought under § 1983, the Ninth Circuit concluded that no parts of the plaintiffs' § 1983 claims were in fact time barred, thus clearing the way for the plaintiffs to proceed to trial on the merits as to their claims brought pursuant to 42 U.S.C. § 1983 for the takings triggered by TRPA's 1984 Plan, initiated by the predecessor interim moratoria, and extended by the subsequently-adopted 1987 Plan.[6]

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[6] In 1992, the Ninth Circuit made it clear that the *exclusive* remedy for plaintiffs seeking relief under the takings provisions of the Fifth and Fourteenth Amendments was pursuant to a claim under 42 U.S.C. § 1983, and that such a takings claim could not be pursued directly under the Fifth and Fourteenth Amendments to the Constitution. ***Azul-Pacifico, Inc. v. City of Los Angeles***, 973 F.2d 704 (9th Cir. 1992), cert. den., ____ U.S. ____, 113 S.Ct. 1049 (1993). This decision effectively made plaintiffs' Third Claim for Relief (its § 1983 Claim) the only operative claim for Just Compensation under the Constitution.

Further, while the plaintiffs had briefed at length their contentions before the Ninth Circuit that they properly withheld their fire until 1984 when TRPA first "made permanent" its predecessor temporary prohibitions, and that under well-established law finding its genesis in ***United States v. Dickinson***, 331 U.S. 745 (1947), property owners were not required to resort to piecemeal or premature litigation in pursuing a takings claim until the situation had sufficiently stabilized, and while the plaintiffs had further argued at length that their lawsuits had been timely filed and pursued based on other well-established law, the Ninth Circuit found it did not need to address nor pass upon those contentions. Rather, because the petitioners singularly defended against the § 1983 claims related to the 1981 Ordinance, the 1983 Resolution, and the 1987 Plan based only on the 60-day statute of limitations found in its Compact, and because the Ninth Circuit found that statute was not applicable to bar plaintiffs' § 1983 claims, the Ninth Circuit properly concluded that "[n]o part of TSPC's § 1983 claim is time-barred." Append. to Pet., p. 6a.

Again, TRPA and its partner states dug in their heels. Again, they unsuccessfully petitioned for rehearing and hearing *en banc* before the Ninth Circuit, and when that relief was denied, they filed the instant Petition with this Court seeking to have the determinations of the Ninth Circuit reviewed and reversed by this Court.

II

SUMMARY OF ARGUMENT

The thrust of petitioners' argument to this Court goes like this -- the so-called 60-day statute of limitations found in TRPA's Compact is allegedly "clear and unambiguous"; Congress' "consent" to the bi-state Compact transformed this statute of limitations into a "Federal law"; as such, TRPA's 60-day statute of limitations is now the controlling statute of limitations under this Court's decision in ***Wilson v. Garcia***, ***supra***, as to claims filed under 42 U.S.C. § 1983 against TRPA alleging a regulatory taking and seeking Just Compensation under the Constitution; and plaintiffs' § 1983 claims, which alleged a continuum of actions over a period of years, should in fact be carved up into bite-size pieces just as was done by the district court, and each bite-size piece dismissed where it is shown that the plaintiffs did not file a new lawsuit against TRPA within 60-days after TRPA enacted each ***temporary*** moratorium or extended that moratorium during the pendency of this litigation. To muddy the waters further, the petitioners now contend that somehow their novel approach to creating and applying such a truncated statute of limitations for § 1983 takings claims is in fact "in conflict" with the decisions of other Circuits -- in spite of the fact that no other Circuit has ever addressed such an idea, nor in any way reached a decision even remotely in conflict with the decision of the Ninth Circuit in the instant case.

The fatal flaw in this entire approach, as the Ninth Circuit so quickly discerned, is that the 60-day statute of limitations set forth in TRPA's Compact neither purports to nor does it in fact deal with takings claims brought pursuant to 42 U.S.C. § 1983 under the Fifth and Fourteenth

Amendments, nor can it seriously be contended that the mere "consent" to the Compact by the Congress somehow transformed that 60-day statute of limitations into a new Federal law that should now be viewed as the guiding beacon in determining timeliness of claims brought under § 1983. At best, petitioners have only been able to point to other patently inapplicable bi-state compact cases dealing tangentially with non-related statute of limitations issues -- but certainly no case in any way even remotely suggesting that such a 60-day statute of limitations embedded in a bi-state compact is in fact dispositive as a time-bar in terms of property owners bringing a regulatory takings claim pursuant to § 1983 to obtain Just Compensation under the Fifth and Fourteenth Amendments.

III

REASONS FOR DENYING THE WRIT

A. The TRPA Compact's 60-Day Statute of Limitations is Clearly Inapplicable on its Face to § 1983 Claims

The 60-day statute of limitations found in TRPA's Compact, which the petitioners contend is so unambiguous and obviously controlling, reads in pertinent part as follows:

> Art. VI(j)(4): "A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency. . . shall be commenced within 60-days after final action by the agency. . ."

On its face, this Compact statute of limitations hardly purports to address or even suggest that it is a time-bar as to

claims brought against TRPA arising out of the denial of Just Compensation protections of the Fifth and Fourteenth Amendments, nor as to claims seeking redress under those Constitutional provisions brought pursuant to § 1983 of the Federal Civil Rights Act.

Clearly, the claims of the plaintiff-property owners seeking Just Compensation for the taking of their private property pursuant to the Fifth and Fourteenth Amendments are not *per se* claims "arising out of the adoption" of the regulations as such, but are in fact claims arising out of TRPA's failure to provide the plaintiffs constitutionally-mandated Just Compensation following the taking of their property. As the plaintiffs argued to the Ninth Circuit, "the nature of the right sued upon . . . determines the limitations period." ***Edwards v. Fresno Community Hospital***, 38 Cal.App.3d 702, 704 (1974); *see also*, ***American Pipe and Const. Co. v. Utah***, 414 U.S. 538 (1974). In this case, the right sued upon is the right to Just Compensation following the taking. Surely Art. VI(j)(4) of TRPA's Compact on its face makes no attempt to create a 60-day time bar to such claims seeking Just Compensation brought pursuant to the Federal Civil Rights Act.

Nor, after more than ten years of hard fought litigation, have any of the petitioners been able to point to any scintilla of legislative history that suggests that when the California and Nevada Legislatures amended the current TRPA Compact in 1980, nor for that matter when Congress acted to grant its consent to those amendments in late 1980, any member of either Legislature or the Congress ever suggested that the 60-day statute of limitations being inserted in the Compact was intended to impose such an unusually short statute of limitations for aggrieved citizens to pursue their constitutional claims for Just Compensation under the

Constitution. The fact is there is no such legislative history because neither the Legislatures of California or Nevada, nor the Congress, ever considered nor intended that the 60-day statute of limitations would ever be so construed. Only the attorneys now defending TRPA's total proscriptions on use of private property have belatedly found such new enlightenment, contending for the first time that the Compact's 60-day statute of limitations should now be construed as the new definitive Federal law applicable to the initiation of claims brought pursuant to § 1983 by property owners asserting that their property has been "taken for public use without just compensation".

B. The Ninth Circuit Properly Found the Compact's 60-Day Statutes of Limitations Should Not be Applied to Bar Each Bite-Size Piece of the Plaintiffs' Takings Claim

The petitioners -- TRPA and the Attorneys General of the two states -- do not stop there. Should they be successful in their quest to have new meaning read into the Compact's 60-day statute of limitations, it necessarily follows that they will then seek to have the Court divide the entire continuum of takings alleged in the Complaints into distinct bite-size pieces -- just as they were able to persuade the district court to divide the takings claims into such discrete pieces -- and then apply the 60-day statute of limitations to each such piece.

As the Ninth Circuit in ***TSPC I*** correctly recognized, the plaintiffs' original Complaints were indeed focused on the ***permanent*** prohibitions contained in the 1984 Plan which "made permanent" the similar "interim" prohibitions contained in Ordinance 81-5 and the 8-month follow-up moratorium imposed by TRPA in 1983. But when these

interim measures were made permanent by the adoption of TRPA's 1984 Plan, and that 1984 Plan converted the interim planning moratorium into a permanent prohibition on any use of plaintiffs' properties triggering this legal challenge, the petitioners say in effect: Gotcha -- you're too late to challenge our interim planning moratorium. But if you had sued us when we first adopted Ordinance 81-5 or extended the moratorium for eight months in 1983, we would have asserted you were premature, as those were only interim measures that did not constitute ***final*** action.[7]

But if the petitioners are successful in their quest to invoke TRPA's 60-day statute of limitations as applied to plaintiffs' § 1983 claims, necessarily they will then urge that each discrete element of the takings claims must be independently and separately analyzed for purposes of the 60-day statute of limitations. To do so, they must also conveniently overlook the well-established body of law that has long dispensed with such procedural rigidity in inverse condemnation cases. Thus, nearly 50 years ago, in ***United States v. Dickinson***, 331 U.S. 745, 749 (1947), a case involving an inverse condemnation claim, this Court held that "***the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'.***" Instead, Justice Frankfurter, speaking for a unanimous Supreme Court, stated:

> The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding

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[7] Even the very 60-day statute of limitations the petitioners contend is applicable to the plaintiffs' takings claims makes it clear that it does not commence to run until "60-days after ***final*** action by the agency."

> "causes of action" -- when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit is brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him -- for instance, the uncertainty of damage and the risk of *res judicata* against recovering later damage as yet uncertain. * * * And as there is nothing in reason, so there is nothing in legal doctrine to preclude the law from meeting such a process by postponing the suit until the situation becomes stabilized. *Id.* at 748-749.

In ***Dickinson***, the Supreme Court established the rule in inverse condemnation actions that the landowner need not bring an action until the situation has "sufficiently stabilized", particularly in circumstances such as the instant case in which the facts giving rise to the alleged taking are in the nature of a continuum of governmental regulatory enactments. This principle has been repeated in numerous inverse condemnation cases where the landowners was allowed to wait until the situation became stabilized, and the damages certain, before bringing suit. ***See, e.g.***, the leading California case of ***Pierpont Inn, Inc. v. State of California***, 70 Cal.2d 282, 294 (1969); ***Gordon v. City of Warren***, 579 F.2d 386, 391 (6th Cir. 1978); and ***Lockary v. Kayfetz***, 587 F.Supp. 631, 635-6 (N.D.Cal. 1984).

It would make little sense to require plaintiffs to file suit immediately upon the adoption of ***temporary*** bans on development, particularly where more permanent measures are being debated and were expected to supersede those temporary measures in the near future. Further, as far as the plaintiffs were aware, the interim moratorium imposed by TRPA could have been suspended at any time. If the moratorium were lifted relatively promptly, the plaintiffs might well have chosen not to pursue their judicial remedies.

Under these circumstances, the law should and does encourage potential plaintiffs to adopt a "wait-and-see" attitude. Only when the situation ***stabilizes*** in the form of a permanent and final determination by a regulatory agency does it make sense to require the plaintiffs to decide whether to resort to litigation. A rule requiring the plaintiffs to file suit within 60 days of the adoption of any temporary moratorium and at a time when it is unclear just how long that temporary moratorium might last, would only encourage premature and possibly unnecessary litigation, and flies in the face of the settled principle first articulated by Justice Frankfurter in ***Dickinson***.[8]

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[8] When the instant lawsuits were originally filed in 1984, a body of case law also clearly suggested that "interim" land use moratoria were not subject to immediate judicial challenge. In fact, this is the very position that was repeatedly argued and asserted by the petitioners in their earlier briefs to the Ninth Circuit in this case.

> Numerous federal and state court decisions have upheld the power of agencies to impose interim land use prohibiting all development for a temporary period -- measures more restrictive than the regulatory program at issue herein. (Numerous citations omitted.)

C. The Compact's 60-Day Statute of Limitations is Not the *Single* Statute of Limitations Applicable to *All* § 1983 Claims As Mandated by *Wilson v. Garcia*

The petitioners would also have this Court find that TRPA's 60-day statute of limitations must be viewed as the controlling "federal law" based merely on Congress' action in ratifying the amended Compact containing that limitations provision. Then, turning their attention to this Court's holding in ***Wilson v. Garcia***, *supra*, the petitioners would ask this Court to create an entirely new doctrine -- that while recognizing there is now a ***single*** appropriate statute of limitations in each state applicable to ***all*** § 1983 claims, nevertheless in those small portions of each state covered by a bi-state planning compact, there should be a separate statute of limitations for § 1983 claims based upon whatever those two states determine is appropriate in that small portion of their states affected by that compact. In this case, the argument goes, the citizens who own private property within the comparatively small jurisdictional area covered by the TRPA in both the States of Nevada and California should be treated entirely differently than all other property owners in those two states. Thus, in lieu of the single statewide statute of limitations now applicable to § 1983 claims brought anywhere else in California or Nevada pursuant to ***Wilson v. Garcia***, the petitioners contend that the TRPA Compact's truncated 60-day statute of limitations should be applicable to private property owners only in the Tahoe Basin.

Continued:

See, California's Brief before the Ninth Circuit in ***TSPC I***, filed on April 17, 1987, at p. 22.

Again, this argument entirely misses the mark. First, as this Court has previously found in ***Lake Country Estates v. TRPA***, 440 U.S. 391 (1979), and most recently addressed in ***Hess v. Port Authority Trans-Hudson Corporation***, ___ U.S. ___, 115 S.Ct. 394 (1994), a bi-state compact between two states is just that -- a compact between the two states that requires congressional "consent" or ratification before it takes effect (Const. Art. I, § 10). That does not automatically transform it into some form of higher federal law that supersedes or transcends the state interests involved. (See the helpful discussion of bi-state compacts and entities set forth in ***Hess, supra,*** at 400-401.) While it goes beyond the scope of this brief response to address this issue at length, suffice it to say that this Court has previously found in ***Lake Country Estates, supra,*** that the TRPA is still very much a creature of the States of California and Nevada, that the TRPA Governing Board and that agency's financing are almost exclusively controlled by the two states, and that when TRPA undertakes regulatory enactments, it does so "under color of state law" as that term is used in 42 U.S.C. § 1983. Thus, § 1983 has specifically been held to provide a remedy for individual property owners alleging the deprivation of their Constitutional rights by actions taken by the TRPA. It therefore would hardly make sense to deviate from the clear guidance set forth in ***Wilson v. Garcia*** that in each state, "one most appropriate statute of limitations for all § 1983 claims" be selected in view of the "federal interests in uniformity, certainty, and minimization of unnecessary litigation". 471 U.S. at 275.

The Ninth Circuit, in a series of cases subsequent to ***Wilson v. Garcia***, clearly spelled out that singular applicable statute of limitations. Thus, at the time this case was originally filed in June, 1984, the single statute of limitations applicable to all § 1983 cases in ***both*** California and Nevada

was three years. ***Gibson v. United States***, 781 F.2d 1334 (9th Cir. 1986) applicable to California; ***Mason v. Schaub***, 564 F.2d 308 (9th Cir. 1977) applicable to Nevada. The fact is that the plaintiffs' Complaints, originally filed on June 25, 1984, were filed within three years of the date of adoption of Ordinance 81-5, the earliest of the interim moratoria, even if it is necessary to apply the applicable § 1983 statute of limitations to each individual enactment.[9]

As the Ninth Circuit perceptively noted, TRPA and its two partner states are not now arguing that these lawsuits were not timely filed nor pursued under the singular statute of limitations applicable to § 1983 claims otherwise applied throughout the remainder of California and Nevada based on well-established precedents. Rather, they simply contend that in lieu of that single statute of limitations mandated by ***Wilson v. Garcia***, the Compact should be viewed as creating a new federal law that creates an entirely distinct statute of limitations applicable only to § 1983 cases brought against TRPA. That, of course, flies in the face of the mandate of ***Wilson v. Garcia*** to create a *single* statute of limitations in each state applicable to *all* § 1983 claims without reference to where they arise in each state.

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[9] Petitioners also point out that as to § 1983 cases filed ***after*** the decision in ***Wilson v. Garcia*** in 1985, there is now a different statute of limitations in California (one year), as contrasted with a two-year statute in Nevada. That necessarily follows from the dictates of ***Wilson v. Garcia*** that there be a single, most applicable statute in ***each*** state. That certainly is no reason to compound these already existing differences by having still a third limitations period in the Tahoe Basin. To reiterate, this is not an issue joined in this litigation, as it is undenied that the operative statute of limitations for § 1983 claims in ***both*** California and Nevada was three years at the time these cases were filed.

D. The Purported Conflict with Other Circuit Court Decisions is Simply Made of Whole Cloth

The petitioners' attempt to create a "conflict" between the Circuits -- when in fact none whatsoever exists -- must be seen for what it truly is, simply a wild stretch of the advocate's imagination. The fact is there is no such "conflict", as indeed no other Circuit has had the occasion to rule on such an issue, and no other bi-state agency except TRPA has ever hidden behind such a patently brief 60-day statute of limitations to try to protect itself from claims of regulatory takings pursued under § 1983.

At best, the petitioners have simply been able to point to two unrelated series of lawsuits dealing with entirely separate issues. The first arose from the district courts in New Jersey and the Eastern District of New York, was then heard by the Third Circuit (8 F.3d 811 (3d Cir. 1993)), and ultimately was addressed by this Court last term in ***Hess v. Port Authority Trans-Hudson Corporation***, *supra*. In *Hess*, of course, the issue was entirely different than the one at bar. It had absolutely nothing to do with the applicable statute of limitations to be applied to § 1983 takings claims for Just Compensation brought against a bi-state agency, nor anything remotely resembling the applicability of a 60-day statute of limitations purporting to bar such claims. Rather, those cases dealt with the claims of injured employees of the subsidiary agency of the bi-state authority created by bi-state compact, and the Eleventh Amendment immunity being asserted by the bi-state authority.

Try as we may, we cannot conceive of how that litigation somehow addresses or deals with issues even remotely comparable to the ones at bar -- that is, the interpretation of TRPA's 60-day statute of limitations

provision and the applicability of that provision to § 1983 claims being pursued to seek Constitutionally-mandated Just Compensation for a regulatory taking.

The petitioners also point to an older decision of the District Court for the Eastern District of New York affirmed by the Second Circuit in ***Rao v. Port of New York***, 222 F.2d 362 (2d Cir. 1955). Again that litigation dealt not with a § 1983 claim, but with an Eleventh Amendment issue: whether the Eleventh Amendment immunities afforded to the States of New York and New Jersey also extended to the bi-state Port Authority, and other unrelated procedural issues. However, nothing in that New York litigation addressed nor dealt with the issue before the Ninth Circuit, that is the applicable statute of limitations for claims seeking Just Compensation for regulatory takings brought against a bi-state agency.

Even a cursory reading of the Ninth Circuit's decision in the instant case makes it abundantly clear that it was addressing a narrow issue: whether TRPA's 60-day statute of limitations, on its face or construed under applicable case law, should be applied to bar § 1983 claims brought for failure to provide Just Compensation under the Fifth and Fourteenth Amendments. As such, the Ninth Circuit necessarily addressed the holding of this Court in ***Wilson v. Garcia***, *supra*, that made it abundantly clear there was to be a *single* statute of limitations to be applied in each state applicable to *all* § 1983 claims. Certainly, the issue addressed by the Ninth Circuit in the instant litigation is entirely different and distinct from the issues raised in the New York-New Jersey Port Authority litigation. In brief, it strains all reason to now suggest that somehow that entirely differing appellate litigation has created an inter-Circuit conflict warranting intervention by this Court.

IV

CONCLUSION

For the foregoing reasons, the respondents respectfully request that this Court either summarily affirm the Ninth Circuit's decision in this case, or in the alternative, deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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